

1 *Policy and Liberty Mutual Insurance and Liberty Life Insurance Co. of Boston, No C-05-*
 2 *2716SC, 2008 U.S. Dist. LEXIS 4295 (DC Calif, Northern District).* The regulations set out
 3 the minimum procedural requirements that Liberty must satisfy to meet their obligations under
 4 ERISA to Ms. Carr. The Department of Labor has confirmed that the regulations set out only
 5 minimum requirements:

7 After due consideration of the issues raised by the written comments and oral
 8 testimony, the Department has modified the scope of the proposal [for the new
 9 regulations], refined its requirements as to minimum procedural standards for the
 10 resolution of benefit claim disputes, and is now publishing in this notice, in final
 11 form, regulation 2560.503-1, establishing new minimum procedural requirements
 12 for benefit claims under employee benefit plans.

13 Federal Register, Vol. 65, No. 225, 65 FR 70426 (November 21, 2001). The regulations took
 14 effect on January 1, 2001 governing all claims from that date forward. Therefore the most
 15 current set of regulations are the regulations governing this claim. 29 CFR 2560.503-1(a)-
 16 (m). We have attached a copy of these regulations for the Court's reference.

17 The regulations require that the ERISA fiduciary, Liberty, provide the following
 18 information to Ms. Carr, the claimant, with respect to the adverse benefit decisions on both
 19 her short term and long term disability claims:

20 (3) A statement that the claimant is entitled to receive, upon request and free of
 21 charge, reasonable access to, and copies of, all documents, records and other
 22 information relevant to the claimant's claim for benefits. Whether a document,
 23 record, or other information is relevant to a claim for benefits shall be determined
 by reference to paragraph (m)(8) of this section.

24 29 CFR §2560.503-1(j)(3). Paragraph (m)(8) states:

25 A document, record, or other information shall be considered

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1 relevant to a claimant's claim if such document, record or other
2 information:

- 3 i. was relied upon in making the benefit determination;
- 4 ii. was submitted, considered, or generated in the course of making
5 the benefit determination without regard to whether such
6 document, record, or other information was relied upon in making
7 the benefit determination;
- 8 iii. demonstrates compliance with required administrative processes
9 or safeguards;
- 10 iv. in the case of a ...plan providing disability benefits, constitutes a
11 statement of policy or guidance with respect to the plan
concerning the denied benefit for our client's diagnosis, whether
or not it was relied on in making the benefit determination.

12 29 CFR §2560.503-1(m)(8). Liberty gave no such notice in its handling of the short term
13 disability claim (although they did ambiguously offer "pertinent documents" made most
14 concurrently (November 29, 2001) with the date of disability August 28, 2001. (CF001097-
15 98; CF000960-61; and CF000769). However Liberty considered the short term disability
16 denial in their denial of the long term disability claim. (CF000769). In fact much of their
17 focus rests on the 90 days from August 29, 2001 - November 26, 2001. (*See November 17,*
18 *2003 Initial Denial of LTD claim at CF000769*). Therefore the procedural failings in notice
19 in the short term disability claim, affected the record and also the review and contributed to
20 the adverse benefit decisions made in the later evaluation of the long term disability claim.

21 Furthermore, as this year the *Saffon Court* so aptly put, ERISA requires a meaningful
22 dialogue between ERISA fiduciaries and a claimant in a manner a claimant can understand.
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1 *Saffon*, 2008 U.S. App. LEXIS 334; *Booton*, 110 F.3d 1461, 1463 (9th Cir. 1997). The
 2 regulations required Liberty in their letter to provide "a description of any additional material
 3 or information necessary for the claimant to perfect the claim and an explanation of why such
 4 material or information is necessary. 29 CFR §2560.503-1(g)(1)(iii). This should not be a
 5 passive "send us whatever you want" type of notice. It should contain the substance of missing
 6 information or inadequate information that Plaintiff could remedy in their appeal. As the
 7 *Saffon* court put it:

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 10 Ten years ago in *Booton v. Lockheed Medical Benefit Plan*, 110 F.3d 1461, 1463 (9th
 11 Cir. 1997), we interpreted the ERISA regulations as calling for a "meaningful
 12 dialogue" between claims administrator and beneficiary. In resolving *Saffon's* claim
 13 for benefits MetLife was required to give her "[a] description of any additional
 14 material or information "that was "necessary" for her to "perfect the claim," and to
 15 do so" in a manner calculated to be understood by the claimant." 29 C.F.R. §
 16 2560.503-1(g).

17 *Saffon* at 14-15. The short term disability initial adverse benefit decision did not do this in
 18 a manner Ms. Carr could understand. (CF001094).

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**C. LIBERTY FAILED TO PROVIDE FULL AND FAIR REVIEW
 REQUIRED BY ERISA BECAUSE OF PROCEDURAL
 VIOLATIONS AND INFLECTION WITH BIAS**

**1. LIBERTY FAILED TO ADEQUATELY INVESTIGATE
 THE CLAIM PROVIDING EVIDENCE OF BIAS.**

Abatie, citing *Booton*, recognizes as a minimum requirement that Liberty had a duty to
 plaintiff Carr to investigate her claim and ask her for necessary evidence. *Abatie* at . Failure
 to investigate or ask for necessary evidence weighs heavily against Liberty.

1 In this case, the short term disability claims managers did very little other than collect
 2 medical records, have them reviewed by two doctors, and deny the claim. At the initial
 3 evaluation they did even less accepting the Attending Physicians Statement which said Ms.
 4 Carr could performing heavy work, and ignoring the multiple diagnoses she carried. They
 5 accepted that check mark in a box without question in the face of facts raising questions.
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7 As part of their very limited investigation of this claim, Liberty does call Ms. Carr
 8 January 22, 2002,, for what they call an initial interview, the very day they plan to deny her
 9 claim. (CF001095). They confirm that no doctor told her to stop working. They ask for her
 10 symptoms impairing her ability to work. When she is asked what keeps her from working,
 11 the claim note reflects she told Liberty: "EE states that she suffers from excessive
 12 fatigue...nausea,,,pain in muscles/joints or arm-leg-hands...high blood pressure...gastric
 13 reflux." (CF001095). She had previously said she could not go into work on August 29,
 14 2001 because she "was just too sick to go into work." (CF001080).
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16 This report stands in stark contrast with the Lamb APS. How could anyone be cleared
 17 for "heavy work" with those stated problems? Apropos of Dr. Lamb, Ms. Carr is reported to
 18 have told Liberty: "EE states that Dr. Lamb may not have been aware of how bad she was
 19 feeling during that time." (CF001080). It is at the end of this phone discussion, Liberty tells
 20 Ms. Carr: "I informed EE that based on her statement that no physician ever advised her to
 21 cease work and the APS from Dr. Lamb - that I have no alternative but to deny her claim."
 22 (CF001080).
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1 As stated earlier, alternatives did exist. Because of the disconnect between the reported
 2 symptoms Ms. Carr described and the doctor's assessment of function, she could have
 3 referred the case to medical to talk with the doctor to make sure a mistake had not been made.
 4 Liberty could have asked Ms. Carr to provide from Dr. Lamb an explanation of her
 5 assessment of capable of heavy work compared to Ms. Carr's symptoms. Instead they, stood
 6 pat, and told Ms. Carr they are denying the claim and that she could appeal if she disagreed.
 7 Not surprisingly, Ms. Carr told Liberty she did disagree. (CF001080).
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9 In evaluation of the long term disability claim, Liberty really did not do much more.
 10 They requested records, they had the records reviewed by a favored insurance claim reviewing
 11 doctor, they discounted favorable information and they denied the claim.
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 14 **2. LIBERTY VIOLATED ERISA REGULATIONS IN THE**
 15 **LETTER PROVIDING THE INITIAL ADVERSE**
 16 **BENEFIT DECISION WHICH FAILED TO MEET**
 17 **ERISA REQUIREMENTS. LIBERTY FAILED TO TELL**
 18 **MS CARR IN A WAY SHE COULD UNDERSTAND,**
 19 **THE TYPE OF INFORMATION SHE NEEDED TO**
 20 **SUBMIT TO PERFECT HER CLAIM –EVIDENCE OF**
 21 **A PROCEDURAL VIOLATION**

22 Liberty sent a letter denying the short term disability claim dated January 22, 2002 to Ms.
 23 Carr. The letter confirms the decision to deny the claim they had told her by phone. The
 24 letter states they "requested medical information from your physician(s) and then compared
 25 your restrictions and limitations to the requirements of your job with your current employer.
 26 (CF001097). In fact, all they did was send an attending physicians statement to Dr. Lamb.
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1 The letter indicates Ms. Carr submitted a claim for Gastric Reflux Disorder, Hypertension,
 2 Fibromyalgia, and Anxiety. Again this does not meet the requirements of *Saffon* for a
 3 meaningful dialogue. Liberty takes an extremely passive approach. Why did they not send
 4 APS to all the doctors? Why did they not get medical records from all the doctors?
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6 **3. THE FAILURES OF THE SHORT TERM DISABILITY**
 7 **CLAIM WERE ADOPTED IN THE EVALUATION OF**
 8 **THE LONG TERM DISABILITY CLAIM – EVIDENCE**
 9 **OF BIAS AND PROCEDURAL VIOLATIONS**

10 The initial adverse benefit decision in the long term disability claim November 17, 2003,
 11 recounts the history of the short term disability claim as a foundation for the denial of the long
 12 term disability claim:

13 Our comprehensive review of Ms. Carr's claim reveals the following
 14 information—on November 29, 2001 Ms. Carr telephoned in a claim to Liberty Life
 15 Assurance Company of Boston ("Liberty") for Short Term Disability benefits for
 16 Carpal Tunnel Syndrome right wrist, Autoimmune Rheumatoid Disorder and High
 17 Blood Pressure. She indicated that her disability was work related. A timely and
 18 thorough review of Ms. Carr's claim commenced. Telephone attempts to gather
 19 medical information from Dr. Lamb, who Ms. Carr stated was her treating
 20 physician, were unsuccessful and on December 3, 2001 a request was faxed to Dr.
 21 Lam for medical records and completion of an Attending Physicians Statement. A
 22 letter was also sent to Ms. Carr to advise the request had been made and the
 23 information was required by January 2, 2002 or we would make a claim
 24 determination based on the information in the file.

25 On December 11, 2001, we received a letter from Ms. Carr stating she had contacted
 26 Dr. Lamb's office to advise that the medical information required by Liberty was
 27 time sensitive. Ms. Carr also asked in the letter if there was anything further she
 28 could do to facilitate the claim or if any additional paperwork needed completion.
 Ms. Carr also inquired if medical report was were received from Dr. Dixit or Dr.
 Wong. Liberty called Ms. Carr immediately to advise no information had been
 received to date from Dr. Lamb and that requests had not been sent to Dr. Dixit or

1 Dr. Wong, as she had previously stated Dr. Lamb was her treating physician and it
2 was Dr. Lamb who reportedly had taken her out of work.

3 Liberty telephoned Ms. Carr on January 2, 2002, and left a voice mail message that
4 the medical from Dr., Lamb had never been received. Ms. Carr called to request our
5 fax number, which was provided. Dr. Lamb's office then called asking for a 24
6 hour extension on getting the medical faxed to our office. This request for
7 additional time was granted. On January 3, 2002, the information including the
8 Attending Physicians Statement, was received and the file forwarded to a case
9 manager for review.

10 An interview was attempted by the case manager with Ms. Carr on January 21,
11 2003, however, we were unable to reach Ms. Carr, and a voice mail message was
12 left for her to return the call. Ms. Carr did call back on January 22, 2003 and when
13 asked if any of her physicians told her to cease work, she stated no. She indicated
14 that Dr. Wong tried to convince her to resign from her job and look for other work.
15 Ms. Carr was advised that Dr. Lamb's completed Attending Physicians Statement
16 was received via fax on January 3, 2002. On the form Dr. Lamb indicated Ms. Carr
17 had a class 2 physical restriction – no limitation in functional capacity; capable of
18 heavy work and was not advised to cease work. Ms Carr was then advised that her
19 claim would be denied as the medical documentation submitted in support of her
20 claim did not establish disability as defined in the policy Ms. Carr was advised that
21 a letter would be forthcoming including her ERISA right to appeal if she disagreed.
22 Ms. Carr stated she did disagree.

23 (CF000769). This letter provides a very filtered description of what really went on in the
24 short term disability claim. There is no record of receiving anything from Dr. Lamb other
25 than the APS. Furthermore, as the Short Term Disability claim is evaluated on appeal, this
26 is when the medical records are collected for the first time. (CF001079. CF001089;
27 CF001095; CF001080).

28 Somewhat concerning also is the fact that Ms. Carr told Liberty she did not really know
what she was supposed to submit in her 3/15/2002 appeal of the short term disability denial,
and asked that Liberty talk to Dr. Dixit. The letter continues:

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1 On March 19, 2002, a letter of appeal was received from Ms. Carr. However no
 2 medical information was contained therein. Ms. Carr did state that she wanted
 3 Liberty to contact Dr. Dixit for information about her reported disabling condition.
 4 On March 22, 2002 Liberty sent medical requests to Dr. Lamb, Dr. Dixit and Dr.
 5 Wong, all of the providers Ms. Carr had treated with, and the file was forwarded to
 6 the Appeal Review Unit.

7 Medical records from the three providers were received by April 18, 2002 and a
 8 review was conducted. On May 8, 2002, the appeal review was completed and the
 9 determination to maintain the denial was made as Ms. Carr did not meet the
 10 definition of disability.

11 (CF000769.) Liberty and their claims analyst Mary Ellen Smith proceeded to evaluate and
 12 decide the appeal without letting Ms. Carr know of the shortcomings of her support in their
 13 eyes. They made no attempt to contact and talk to her physicians. They refused to credit the
 14 opinions of the doctors provided for the claim in favor of the initial records and the Lamb
 15 APS.

16 3. **LIBERTY FAILED TO CONTACT DR DIXIT, DESPITE A**
 17 **REQUEST FROM MS. CARR THAT THEY DO SO, GIVEN**
 18 **HER CONFUSION OVER WHAT SHE NEEDED TO PROVIDE**
 19 **LIBERTY TO OVERCOME THEIR DENIAL—EVIDENCE OF**
 20 **BIAS AND PROCEDURAL VIOLATIONS AFFECTING THE**
 21 **CLAIM..**

22 In her March 15, 2002 appeal letter Ms. Carr told Liberty: "Since I am not confident
 23 about what Liberty needs to review, but I do want a review, please contact Dr. Dixit for data
 24 or information about my disabling condition." (CF001094). This statement provides strong
 25 evidence of a violation of 29 CFR 2560.503-1(g)(3). The fact that Liberty did nothing more
 26 than obtain medical records they had not obtained during the initial evaluation and rest their
 27 laurels on the questionable attending physicians statement by Dr. Lamb does not meet the

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1 requirement reinforced in *Saffon* of the need to engage in a meaningful dialogue in a manner
 2 calculated to be understood by a claimant. *Saffon*, 511 F. 3d 1206 (9th Cir. 2008).

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 5 **4. SHOWING THEIR BIAS BASED ON THEIR CONFLICT,**
 6 **LIBERTY FAILED TO GIVE ANY CREDIT TO CLAIMANT'S**
 7 **SUPPORTING MATERIAL RELYING INSTEAD ON A**
 8 **QUESTIONABLE ATTENDING PHYSICIAN STATEMENT**
 9 **LATER CONTRADICTED, AND THREE RECORD REVIEWS**
 10 **BY BIASED INSURANCE COMPANY DOCTORS**

11 **a. Liberty never considered the requirement of three**
 12 **months of widespread pain to enable Dr. Dixit to**
 13 **diagnose fibromyalgia October 24, 2001**

14 Relying on Dr. Lamb's Attending Physicians Statement, particularly the check in the box
 15 for no functional disability, Liberty ignores the multiple diagnoses they knew Ms. Carr had.
 16 With respect to the fibromyalgia diagnosis, which they do not question, they do not consider
 17 that in order to have a valid diagnosis as of October 24, 2001, Ms Carr had to provide a
 18 history of widespread pain for at least three months prior to that date. (CF000687; see
 19 LL01196). Since no one at Liberty questioned the diagnosis, one can only infer that Dr. Dixit
 20 knew the basic ACR criteria and made his diagnosis based on a history of widespread pain
 21 dating back to July 2001. Furthermore, Liberty's own claim manual recognizes that to
 22 diagnose fibromyalgia you will need to obtain a history of at least three months of fatigue,
 23 headache, sleep disturbance, or paresthesias. (LL01196; LL02021). If you compare the
 24 definition used to educate claims handlers in LL01196 with the actual criteria for
 25

1 fibromyalgia, (CF000687) you will note that they neglect to mention one of the key
 2 criteria—three months of widespread pain, with pain above the waist, below the waist, on the
 3 left side of the body, and on the right side of the body, with axial pain (pain in the spine). The
 4 LL2021 description provides a little improvement, but it is training material from John Hewitt
 5 & Associates. It wrongly appends to the accepted diagnostic criteria requirements of fatigue,
 6 sleep disturbance, headaches and paresthesias whereas the actual criteria only require tender
 7 points and widespread pain. (*Compare LL2021 with CF000687*).
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 10 **b. Liberty never considered the Lamb and Dixit**
 11 **Impairment Questionnaires, providing any reason**
 12 **why they should not accept the opinions and**
 13 **observations they contain.**

14 The record in this case provides absolutely no meaningful explanation as to why Liberty
 15 did not give any credibility to the Impairment Questionnaires filled out by Dr. Lamb and Dr.
 16 Dixit. (CF000211-204 Lamb; CF000231-236 Dixit). They also have not explained why
 17 they give no credibility to the letters provided by Dr. Lamb and Dr. Dixit. (CF000460-461-
 18 Dixit; Plaintiff's Submissions Notebook 4 Tab2). Similarly, the record is without
 19 explanation as to why the finding by Social Security is not significant supporting evidence.
 20 (CF000304-308).
 21

22 These impairment questionnaires date disabling symptoms back to July and August 2001.
 23 Both doctors write that the symptoms included pain, fatigue and cognitive problems. They
 24 clearly state that the doctors believe Ms. Carr to be unable to work in her own or any
 25 occupation. The questions in these questionnaires are far more searching on the issue of
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1 functional disability than anything in the Liberty APS. (CF000211-204 Lamb; CF000231-
 2 **236 Dixit**)

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 4 Instead Liberty focused on the records concurrent with the date of disability rather than
 5 looking at later provided information that responded to their stated concerns that there was
 6 no evidence of impaired function during the elimination period. This has been their constant
 7 refrain throughout the denials of both the short term and long term disability claims.

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 9 **c. Liberty dismissed the Social Security award**
 10 **providing a date of disability of 8/27/01, without**
 11 **providing any good reason, other than we do not**
 12 **have to follow it.**

13 While Plaintiff agrees that the award of Social Security Disability benefits with a date of
 14 disability of August 27, 2001 is not determinative of the Liberty claim, it does provide strong
 15 evidence that Ms. Carr could not engage in her own occupation for the first 24 months of
 16 coverage, and then the inability to work in any occupation after that. This is another piece of
 17 supporting evidence which adds to the weight of support for Ms. Carr's claim that Liberty
 18 casually dismisses. Liberty provides absolutely no reason for totally dismissing the SSD
 19 grant of benefits. Liberty's quick dismissal of this evidence again demonstrates their bias.
 20 Certainly if the claim is granted they will seek an offset for SSD benefits paid during any
 21 period for which Liberty pays benefits. (*See Group Disability Income Policy, Section 4,*
 22 **Benefits from Other Income, Form DOP-LTD-0012.05; DOP3-LTD-0014).**

d. **Liberty never sought an IME, asked very narrow questions of their record reviewers, and selected biased record reviewers**

In this case, Liberty selected three very biased record reviewers, favorites of the insurance industry: John Holbrook, MD; Gale Brown, Jr. MD, and Amy Hopkins, MD. None of these physicians examined Ms. Carr. They were only provided information that Liberty gave them. As described below, they viewed the evidence with a filter leaving out meaningful consideration of favorable evidence, and highlighting evidence supporting denial of the claim.

Interestingly, in *Saffon*, the Court faulted MetLife for they way they communicated their record review findings to the treating physicians. In this case, with the unsupportive attending physicians statement by Dr. Lamb, Liberty made no effort to contact Ms. Carr's physicians. Even when confronted with contrary evidence in their evaluation of Ms. Carr's long term disability claim, they did not choose to send their record reviews to the treating physicians or do anything else with the treating physicians besides obtaining and reviewing their medical records.

In *Saffon*, the 9th Circuit Court observed:

MetLife referred Saffon's appeal to Dr. Robert A. Menotti, who, like Dr. Thomas, neither examined nor interviewed her. After reading MetLife's file, Dr. Menotti concluded that "[t]here simply is not enough objective medical findings and office notes that have continued to flow into this file, that convince this reviewer that the claimant's self-reported headache and chronic pain syndrome has been enough to preclude her from" working.

Saffon at 13. This is similar to what each of the three record reviewers found in evaluating

1 Ms. Carr's claim. Dr. Holbrook concluded on October 20, 2003: "(1) The preponderance of
 2 clinical evidence in the medical file supports conclusion that the claimant did have functional
 3 capacity for full-time sedentary work on August 29, 2001. (2) There have been multiple
 4 physical exams other than Dr. Dixit since 8/29/01. One would expect that if the claimant
 5 were substantially impaired on 8/29/01, that others would have noticed exam findings
 6 consistent with this impairment.." (CF000786). Dr. Gale Brown, on November 19, 2003
 7 concluded: "Based on the reviewed medical documentation, to a reasonable degree of medical
 8 certainty, it is this reviewer's opinion that Ms. Carr did not have any medical impairments as
 9 of 8/29/01 supporting physical restrictions or her inability to perform the essential duties of
 10 her own sedentary occupation full time. On the contrary, the documentation supports non
 11 medical factors related to work as the primary issue precipitating work stoppage, rather than
 12 any specific medical condition." (CF000775). Interestingly, right after making this
 13 conclusion, Dr. Gale Brown notes the following diagnoses: (1) GERD/hiatal hernia;
 14 (2) Sjogren's syndrome; (3) Fibromyalgia; (4) Menopause; (5) Hypertension; (6) Anxiety; (7)
 15 Depression; (8) Degenerative cervical and lumbar spine disease; (8) Hypercholesterolemia;
 16 (9) Osteopenia; (11) History of H. pylori infections (treated), genital HSV (treated p.r.n.),
 17 childhood jaundice, seasonal rhinitis, tonsillectomy; (12) Rosacea; (13) Mitral valve prolapse.
 18 (CF000775). He does not explore what symptoms these diagnoses probably account for. He
 19 adds in his "Medical Analysis" the following statement: "The reviewed medical
 20 documentation does not support physical impairment or specific physical restrictions as of
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1 8/29/2001.” (CF000776). Then Dr. Gale Brown, as can be expected by the popularity of Dr.
2 Gale Brown with disability insurers, picks through the records to support his claim. A good
3 example of the filter he used is in his first paragraph espousing “careful review.” Dr. Brown
4 quotes the 8/28/2001 note by Dr. Lamb, mentioning exercise and sleeping well, but leaving
5 out the part of the record that stated “sometimes feels extraordinarily tired especially after
6 exercise.” (CF000776). He also does not comment on the 160/108 blood pressure recorded
7 at that visit or the specific complaints or pain or the decision to refer Ms. Carr to a
8 rheumatologist to “rule out a rheumatological disorder with palpable tender lesions, positive
9 ANA, and fatigue.”(CF000171) He discounts the diagnosis by Dr. Dixit and he focuses on
10 Ms. Carr’s ability to exercise. He also picks at the lack of documentation correlating
11 symptoms or physical exam findings although he recognizes “there is documentation of
12 degenerative spinal disease by Xray.” (CF000776) He does note Ms. Carr’s problems with
13 hypertension, but dismisses it as controlled by medication, and notes the lack of any
14 recommendation to curtail her activity due to this condition. (CF000776-777). He then
15 concludes: “In the absence of verifiable physical impairment I find no basis to impose any
16 physical restrictions or limitation, including the period 8/29/01 forward.” (CF000777). He
17 dismisses Dr. Dixit: “The physical restrictions recommended 5/320/03 by Dr. Dixit do not
18 correlate with any specific physical pathology, or any objective functional data.”
19 (CF000777). In his review of records, Dr. Brown notes he reviewed the fibromyalgia
20 impairment questionnaire completed by Dr. Dixit 5/30/03 stating Ms. Carr was totally and
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1 permanently disabled. (CF000781). However this questionnaire is a detailed look at
 2 functional impairment finding the total and permanent work disability began in August 2001
 3 and has been continuous.(See FM Impairment Questionnaire at CF000231-236). Dr.
 4 Brown provides no cogent reasons for dismissing the opinions offered in this document. For
 5 his Functional Summary, Dr. Gale Brown wrote:

7 At the time of alleged disability, Ms. Carr worked in a sedentary occupation, as
 8 defined by the DOT. Ms. Carr apparently has admitted to case management that
 9 none of her physicians recommended medical disability when she went out of work.
 10 This concurs with the APS completed by Dr. Lamb 12/01, noting no physical
 11 limitations/restrictions for diagnoses of GERD, hypertension, fibromyalgia, and
 12 anxiety.”

13 On activities questionnaire 9/29/2003, Ms. Carr reports inability to do computer
 14 work, and most self care/house work without assistance. She states she can sit no
 15 more than 2 hours, and stand/walk zero to 1 hour in an 8 hour day.

16 Ms. Carr applied for, and received, Social Security Disability.

17 (CF000782). Dr.,Brown also fails to note that Social Security found Ms. Carr met their
 18 definition of disability (tantamount to an inability to do any occupation) as of August 27,
 19 2001. (CF000304). Dr. Brown makes no comment whatsoever on the Multiple Impairment
 20 Questionnaire completed by Dr. Lamb 4/16/2003 and providing her more detailed findings
 21 and opinions related to Ms. Carr’s functional ability, finding that her symptoms and
 22 limitations had affected Ms. Carr since July 2001. (CF000204-211).

23 The Lamb Multiple Impairments Questionnaire of 4/16/2003 raises an important conflict
 24 with her checked box in her initial Attending Physician Statement dated 11/12/01 and faxed
 25 to Liberty 01/02/02. (CF000178-179). So does the Lamb letter we obtained dated 10/1/04,
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1 discussed as missing in the claim file but referenced in our appeal letter. (Notebook 4, Tab
2 2;)

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4 **f. Liberty failed to consider the types of symptoms**
5 **common to these diagnoses to determine the effect**
6 **of the symptoms on Ms. Carr.**

7 Liberty's own training materials establish the requirement for consistent symptoms of
8 pain, fatigue, headache, sleeplessness for at least three months to establish the diagnosis of
9 fibromyalgia. We do not have the Presley Reed duration guidelines for Fibromyalgia from
10 this case, but from another case we understand that 3 weeks is the stated duration. As Claims
11 Analysts were referred to Presley Reed's website, this can demonstrate another element of
12 bias against fibromyalgia based claims, as peer reviewed studies establish that there is no cure
13 for fibromyalgia, and once people have it at a level that it interferes with work, it rarely
14 improves enough for them to return to work. [Wolfe Multicenter Study, Bengsston,
15 Henriksson)

17 However, when the training that analysts have tells them that symptoms of pain,
18 headaches, fatigue, etc must be present for at least three months, this should enable them to
19 question the Lamb APS.
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23 **g. Liberty failed to consider the statements of Ms. Carr's**
24 **supporting lay witness statements as evidence**
25 **supporting her claim.**

1 In her appeal of the long term disability claim, Ms. Carr provided statements from several
 2 people who knew her. All support ongoing impairments that they have observed. These were
 3 the statements from Bill Lindley (mymrfixit.com) who has been a handyman helping Ms.
 4 Carr(CF000458); Ellen Hancock, a friend for 50 years (CF000456-457); a 23 year friend Amy
 5 Cherrnay (CF000455); and Elena Carr, Ms. Carr's daughter (CF000459). In particular, Mr.
 6 Lindley in 2004 observes that he has been helping Ms. Carr around her house for the last three
 7 years and has observed her pain interfering with the simplest tasks and has observed her tears
 8 because her pain is so severe during that time, that takes us back into 2001. (CF000458).
 9 Ellen Hancock identifies the start of medical problems she observed in Ms. Carr in the Spring
 10 2001: "Anita's health has been problematic. She has not been able to drive much & has
 11 complained of headaches; pain, dizziness, fatigue, heart palpitations, nausea, memory issues
 12 & general malaise. She has consistently complained to me about these symptoms and
 13 continues to do so." (CF000456). Ms. Hancock continues: "Sometimes when I call her in the
 14 middle of the day, I am waking her up from a long nap. When I saw her on July 29, 2004 and
 15 we went for a very short walk of several blocks, she became fatigued and her legs hurt. That
 16 same day when we ate lunch, she arose from her dining chair in pain and moved very slowly.
 17 ON August 29th we even went shopping and when we went into the first store, Anita wanted
 18 to find a place to sit and have tea in their small café, saying she was already tired."
 19 CF000457).

20 Liberty's review does not evaluate any of these statements that support Ms. Carr's initial

1 disability and ongoing disability.

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4 **h. Liberty failed to give any credit to Ms. Carr's own**
5 **statements, but give no reason for not believing**
6 **them.**

7 Throughout the claim file, Ms. Carr has provided statements to Liberty about her medical
8 condition and disabling symptoms. The last statement, dated October 8, 2004, summarizes
9 much of what she has previously stated. (CF000460-461). It describes her symptoms
10 beginning in January 2001, bad enough to consider taking medical leave. The symptoms she
11 described included severe headaches, severe neck pain, server arm and hand pain, numbness
12 and tingling in her hands, moderate back pain, moderate leg and knee pain, overwhelming
13 tiredness, weakness, mental confusion and forgetfulness. She had very dry eyes and was using
14 eye drops several times a day. She had to go home on many lunch hours just to sleep (she
15 lived very close to where she worked). She had no energy when she awakened in the
16 mornings. She forced herself to go to work.. She saw Dr. Lamb in the morning before going
17 to work on August 28, 2001, and Dr. Lamb told her of the abnormal ANA test, and the need
18 to see a rheumatologist because of that abnormal ANA, and painful lumps,. It took her well
19 over a month to get into see Dr. Dixit. (CF000460-461).

22 They symptoms she experienced stayed the same between August 28, 2001 and October
23 24, 2001 when she saw Dr. Dixit. After she stopped work the symptoms did not change. She
24 would wake up in the morning and then feel so tired she would have to go back to bed.
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28 PLAINTIFF'S INITIAL ARBITRATION BRIEF -43

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1 (CF000461).

2 Ms. Carr indicates that she described her symptoms to Dr. Dixit and he told her that she
3 had both Fibromyalgia and Sjogrens. (CF000461).

4 At the time she wrote this letter in 2004 she found her activities limited due to
5 unpredictable pain, fatigue and cognitive problems. She notes variation in the symptoms,
6 with some days so bad she cannot get out of bed. She notes that her symptoms tend to
7 increase as her activity increases. She describes that the medical conditions and their
8 symptoms limit her ability to shop, including grocery shopping. (CF000461).

9 In addition to this letter we submitted in Ms. Carr's final appeal, there are numerous other
10 statements she has made consistent with this description during the pendency of both her short
11 and long term disability claims. (CF000180; CF001094; CF001079; CF001080; CF001090;
12 CF001095; *see also* PROV00045).

13 Liberty does reference any report of disabling symptoms by Ms. Carr in any of their
14 denial letters in handling both the short and long term disability claims. (See CF001097-1098;
15 CF000960-961; CF000768-773; CF000021-28). They therefore missed the fact that the
16 symptoms Ms. Carr complained of are symptoms expected from the diagnoses of
17 Fibromyalgia and Sjogrens that they agree she has. Liberty turned a blind eye to this
18 supporting evidence.

- i. Liberty totally failed to consider at all the fibromyalgia literature submitted on appeal that supports disability of Ms. Carr due to fibromyalgia.

As part of our appeal we submitted a summary of relevant fibromyalgia literature and attached that literature for Liberty's review (CF000497-503 -Krafchick Law Firm Summary letter; CF000504-692). The summary has been provided with the excerpts we are submitting with this brief. The actual articles referenced in the summary are not being provided as part of the excerpts, but can be viewed in the copy of the claim file that we have submitted. (Notebooks 1 and 2 with all CF claim file pages). In particular look at the following articles about fibromyalgia: Wolfe Multicenter Study (CF000714-722); Robert Bennett Article (CF000723-730); Bengtsson Paper (CF000735-748);Burkhardt and Bennett Paper (CF000479-53); Waylonis Paper (CF000731-734); Henriksson Paper (CF000754-759).

- j. Liberty failed to consider, or show their reviewing doctor, the three days of surveillance they did December 29-31, 2004 that showed no meaningful activity.

As often occurs in Fibromyalgia claims, in the handling of the long term disability claim, Liberty had surveillance of Ms. Carr done. (CF000063-70). The surveillance record says they performed it over three days December 29-31, 2003. The medical condition is noted as GERD (gastroesophageal reflux).In this case, the surveillance finds nothing

1 inconsistent with her statements or doctors statements, so it is never referenced in any of the
 2 denial letter. No doubt that is why it is never referenced in any of the denial letters. However
 3 it does corroborate Ms. Carr's testimony about her then current level of function, and it lends
 4 credence to the doctor opinions regarding the degree of Ms. Carr's ongoing and original
 5 impairment.
 6

7 **k. Liberty fails to address the evaluations by**
 8 **Plaintiff's expert evaluators particularly in light of**
 9 **other supporting information**

10 In the appeal we handled we submitted reports from Dr. Robert Bennett
 11 (rheumatologist)(CF000249-303-report and CV); Dr. Jay Uomoto (neuropsychologist)
 12 CF000351-381-report and resume); Theodore Becker RPT PhD (physical capacity
 13 evaluator)(CF000309-350); and Donald Uslan MA, MBA (vocational and rehabilitation
 14 counselor)(CF000382-454-report and resume). The evaluations by Dr. Becker and Dr.
 15 Uomoto provide objective evidence of physical and cognitive disability. Mr. Uslan finds that
 16 Ms. Carr is not suitable for any employment. Dr. Bennett gives a thorough overview of
 17 fibromyalgia and Ms. Carr's history and why he thinks she cannot work. In his history it is
 18 very clear that the symptoms began in the summer of 2001, and he notes the date of disability
 19 accepted by SSD as August 27, 2001. All of these experts identify problems that the evidence
 20 from Dr. Dixit and Dr. Lamb in their impairment questionnaire, and Ms. Carr in the
 21 description of her symptoms from the time she stopped work and took severance. While
 22 many things were going on in her employment, Ms. Carr clearly had problems with pain and
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1 fatigue as well as cognitive problems. The testing done by these experts in 2004 simply
 2 demonstrates the effects of the symptoms Ms. Carr had at the time she left Providian. Like
 3 the medical literature that also undergirds Ms. Carr's claim, Liberty dismisses these
 4 evaluations as not having any relationship with the initial problems diagnosed as GERD,
 5 Fibromyalgia, and Sjogrens.

7 Even more indicative of Liberty's approach and attitude to this claim, Liberty
 8 notes that there is an October 1, 2004 letter from Dr. Lamb that "was not included with the
 9 appeal." (CF000024). They never called to ask us to provide it. They simply relied on
 10 quotes in the appeal letter. They note she says "In retrospect, I believe her condition was such
 11 that it did not allow her to do full work duties." (CF000024).

13 5. **LIBERTY'S FINAL DENIAL SIMPLY RESTATES THE**
 14 **CONCLUSIONS RAISED PREVIOUSLY AND**
 15 **REHASHES THE SAME FACTS FOCUSING ON**
 16 **HOPKINS REVIEW AND THE LACK OF**
 17 **CONCURRENT MEDICAL, IGNORING THE**
 18 **SUPPORTING EVIDENCE.**

18 We have already discussed the foundation of the final denial of long term
 19 disability benefits grounded in the denial of the short term disability benefits, and we have
 20 noted Liberty's failure to call us to get a copy of the missing Lamb letter we submitted with
 21 our appeal. Dr. Hopkins notes for the first time in any report, that Ms Carr went out of work
 22 because she was laid off and not due to any disability. She focuses on the Lamb APS from
 23 1/2/02. She agrees with diagnosis of Sjogrens on a clinical basis. She questions, for the first
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1 time the validity of Dr. Dixit's tender point evaluation because he did not document control
 2 points. Nothing in the medical literature calls for using control points for a diagnosis of
 3 fibromyalgia. She recognizes the symptoms of pain, fatigue, and tender points can be caused
 4 by Sjogrens with depression, sleep disorder, and myofascial dysfunctions. She also speculates
 5 that since Ms. Carr said her symptoms were worse with work stress, they may be
 6 psychological in origin. She refers to the 1979 Barsky article for that. Interestingly she is not
 7 asked to nor does she comment on any of the much more recent peer reviewed literature
 8 provided in the claim file as part of Ms. Carr's appeal. She recognizes the degenerative
 9 changes found on xray in Ms. Carr's spine, but says no restrictions or limitations were
 10 ascribed to these findings. She appears to ignore back pain that is part of Ms. Carr's
 11 constellation of complaints. She comments on the vocational evaluation of Ms. Carr's job as
 12 a director. (*But see*, CF000903 and CF000914). She dismisses the expert reports we
 13 provided as two and a half years after the date of disability. As the prior letters concluded,
 14 Ms Winterer for Liberty summarizes her evaluation:

18 Thus we conclude based on review of all of the medical
 19 documentation contained in Ms. Carr's disability file, there is
 20 insufficient medical evidence to establish that Ms. Carr's medical
 21 condition was of a nature and severity that prevented her from
 22 performing the material and substantial duties of her Director
 23 Database Technology occupation at the date of disability, August 28,
 24 2001 continuously through the Elimination Period. Therefore, Ms
 Carr did not meet the definition of disability, as defined in the
 Providian Bancorp Services Group Disability Income Policy, and no
 benefits are payable.

25 This claim determination reflects an evaluation of the claim facts

1 and policy provisions.

2 (CF00028). This evaluation like all of the others dismisses all of the favorable evidence and
 3 narrowly focuses on the date of disability and the next 90 days. Why did they not give any
 4 weight to the Impairment Questionnaires by Dr. Dixit and Dr. Lamb or the letters from these
 5 doctors? Why did they not look at the fibromyalgia literature and their information about
 6 fibromyalgia and Sjogrens to recognize the error in Dr. Lamb's initial APS? Why did they
 7 not accept her later opinions and corrections? Why did they not ask for the missing Dr. Lamb
 8 report we had submitted with our appeal? Why did they do surveillance and then not mention
 9 it? The most obvious answer to these questions is that they were determined to deny this
 10 claim and deprived Ms. Carr of a full and fair review.
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 15 **6. LIBERTY FAILED TO FOLLOW THEIR OWN**
 16 **PROCEDURES IN HANDLING MS. CARR'S CLAIM**
 17 **FOR WHAT THEY IDENTIFY AS A COMPLEX**
 18 **DISABILITY**

19 In the materials that Liberty produced as their claims manual in effect during
 20 the pendency of this claim, Liberty specifically mentions fibromyalgia as a complex
 21 disability, and sets out specific procedures their claims analysts should follow to manage
 22 a complex disability claim. (LL01196-98). Other than contacting the claimant, in the
 23 short term disability claim, nothing was done because of Dr. Lamb's APS setting
 24 functional capacity at able to do heavy work. In the initial evaluation of the short term
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 28 PLAINTIFF'S INITIAL ARBITRATION BRIEF -49

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1 disability claim, they did nothing more initially than talking to Ms. Carr on the day they
2 determined to deny her claim, January 22, 2002. They do not get medical records. They
3 do not have their medical department do any review. The letter denying the short term
4 disability claim does not talk to her further, but does reference medical records received.
5 No doubt they will say there is no reason they had to go further because of the contents
6 of the records and Lamb APS. We have discussed this above and will not repeat those
7 arguments again here.
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10 11 **III. CONCLUSION**

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13 The evidence in this case taken in its entirety, supports Ms. Carr's claim for long
14 term disability benefits. Liberty did not engage in a meaningful dialogue with Ms. Carr. They
15 did not provide proper notice in the initial adverse benefit in her short term disability claim.
16 Liberty remains narrowly focused on its review of this claim, blind to any supporting
17 information that comes outside the 90 day elimination period. They did not provide the full
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1 and fair review that ERISA requires. The Arbitrator should grant Ms. Carr her benefits.
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5 DATED this 4th day of March, 2008
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28 PLAINTIFF'S INITIAL ARBITRATION BRIEF -51

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